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Advancing the independence of people with disabilities

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996	WT Docket No. 96-198

Comments of United Cerebral Palsy Associations, Inc.

INTRODUCTION

United Cerebral Palsy Associations, Inc. (UCPA) is one of the largest national nonprofit organizations dedicated to the fostering of independence and opportunity for people with all disabilities. Operating through a network of local and state affiliates, as well as through a number of national projects, UCPA maintains contact with a large number of people with various disabilities in all parts of the nation and of every age, level of education and socio-economic status.

UCPA is grateful for the opportunity of submitting these comments to the Federal Communications Commission (FCC). We believe that our long history of commitment and involvement in the areas of assistive technology (AT) in general, and with telecommunications access in particular have enabled us to develop an expertise that should prove of value here. We also believe that our extensive contacts and relationships with Americans with disabilities and with the business community enable us to offer meaningful insights into many of the difficult balances the Commission must strike between what would be uniformly desirable in an ideal world and what is readily achievable in the world of Section 255.

COMMENT 1 ADOPT ACCESS BOARD GUIDELINES IN FULL
(re NPRM paras. 29-30)

The Commission seeks comment upon its approach to the Access Board accessibility guidelines for telecommunications equipment and customer premises equipment (CPE) (36C.F.R. Part 1193). The Commission proposes to use the Access Board's equipment guidelines as a "starting point" for its work, and to accord the Access Board's guidelines "substantial weight" in the development of the Commission's regulations.

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We think this use of the Access Board's guidelines in an essentially advisory capacity or as an influential but nonbinding background document represents too narrow a reading of the words "in conjunction with," as those words are intended in subsection (e) of Sec. 255.

We recommend that the Commission exercise its authority in favor of adoption of the Access Board guidelines in their entirety. As the Commission itself notes, these guidelines grew out of the broad-based, consultative, consensus-building process of the Telecommunications Access Advisory Committee (the TAAC). UCPA was privileged to be a participant in that process and can therefore assure the Commission that the TAAC process involved the most spirited and diverse exchange and synthesis of views that could be imagined or desired. Although the 61 individuals and groups who responded to the Commission's September, 1996 Notice of Inquiry may represent a larger number of people than were included on the TAAC, the TAAC process represents an unequaled microcosm. Through the TAAC's meetings, its draft and redraft documents, and its final consensus report, the various interests and stakeholders involved with Sec. 255 were given (and took) an extraordinary opportunity to work-out consensus solutions embodying balanced and sophisticated responses to the major issues surrounding equipment accessibility.

The Access Board guidelines follow the TAAC report and are true to it in spirit, in letter and in the sustained commitment to fairness and consensus. For the Commission to relegate the Access Board guidelines to an ambiguous point-of-departure status is--at least with respect to telecommunications equipment and customer premises equipment (CPE)--to reinvent half the wheel and to minimize the efforts of the dedicated representatives of so many diverse stakeholders who gave so much of themselves to make the TAAC process a success.

COMMENT 2 ESTABLISHING A COMPLAINT PROCESS IS THE RIGHT THING TO DO (re paras. 31-34)

We fully agree with the Commission's conclusion that Sec. 255(f) authorizes administrative complaints against both equipment manufacturers and service providers for alleged violation of Sec. 255. It wouldn't make any sense for Congress to have given the Commission broad authority over how to implement Sec. 255, and for Congress to have given the Commission "exclusive jurisdiction" over the implementation of the section, if Congress had intended to bar the Commission from using a complaint process. Support for this view that the Commission does have authority to create administrative remedies for enforcement of Sec. 255 can be derived from a number of sources. One of the most persuasive of these is the care the statute takes in stating that no judicial remedies exist under Sec. 255. Why would Congress have expressly barred judicial remedies only if it meant to proscribe administrative remedies as well? The answer is it wouldn't have and it didn't.

COMMENT 3 BROADEN THE DEFINITION OF COVERED TELECOMMUNICATIONS SERVICES (re paras. 36-43)

The Commission sets forth a detailed explanation for the distinction it makes between those "telecommunications services" and "adjunct-to-basic" services that it regards as covered by Sec. 255(c) of the Act, and those "enhanced" telecommunications services or "information" services that it believes not to be subject to the accessibility requirements of the law. It asks for comment (para. 42) on these distinctions, and in particular asks commenters whether in view of the broad objectives underlying Sec. 255, Congress intended Sec. 255 to apply to a "broader range of services."

UCPA is one of many organizations that supported the inclusion of telecommunications access in the law. Along with many others, we believed that Sec. 255 would usher in a new day of opportunity and access for the people we serve. If for one moment we had suspected that the scope of covered telecommunications services would be defined as narrowly as the FCC proposes here, we think it unlikely that we would have supported subsection (c) of Sec. 255. Indeed, to the many Americans with disabilities who supported the legislation, the realization that it may end up providing essentially no increased access to telecommunications services may almost lead to the conclusion that they were victims of an elaborate hoax.

According to the Commission's interpretation of the law, many of the telecommunications services most needed and most widely used by Americans with disabilities will fall under the definition of "enhances" or "information" services and therefore will not be covered by Sec. 255. For persons with hearing impairments, speech impairments, memory or other cognitive impairments, or even mobility impairments that limit the dexterity required to use most phones, such telecommunications services as email or fax represent the best means or the only means for effectively communicating via the telephone. But if we understand the FCC's proposed interpretation correctly, these services may not be covered.

As much or more than the rest of the population, people with disabilities make extensive use of the telephone system for a variety of personal, commercial and other purposes. Imagine the reaction of these citizens upon learning that voicemail may not be covered by the law. Now they can complete their calls (at least sufficiently to be charged if they are not calling a toll free number) but they can't be assured of effectively communicating by leaving a message with anyone.

Because of its convenience, many Americans with disabilities welcome the prospect of being able to make voice telephone calls over the Internet. Again, they may be in for a surprise when they find out that the telecommunications services necessary to support this capability don't have to be accessible either.

What does have to be accessible under the FCC's definition of covered "basic services"? As we read the NPRM, the apparent answer is that only those services

necessary to technically complete traditional voice telephone calls and TTY calls are covered. But this level of access was already guaranteed under a number of prior laws and has for the most part been widely available with existing technology and industry practices for some time, If all Congress meant to do was to guarantee access to those telecommunications services that were universally deployed and broadly accessible at the time Sec. 255 was enacted, what was the point of subsection (c)?

We are afraid that the Commission's interpretation not only fails to provide the broadened access Congress must have intended (and the supporters of the Act surely expected), but far worse, that this proposed interpretation will actually result in a loss of existing protections, To understand how this can be so, the Commission's interpretation here must be read in conjunction with its concept of "legitimate feature tradeoffs" (NPRM para. 114). Let us suppose that in the provision of traditional voice telephony, a telecommunications service provider or manufacturer of CPE develops new technologies or techniques (e.g. new forms of data compression or new methods of dividing transmissions among packets) that result in some new barrier to the accessibility of this mode of communication for people with one or another major disability. Specifically, suppose (as it very well might) that such new approaches present barriers to those who use augmentative communication devices or other forms of electronic speech enhancement for telephone communication. Presumably the Commission would evaluate such a situation of the loss of accessibility in light of whether a "legitimate feature trade-off' was taking place. If the new technologies in question were perceived to represent a net gain for most users and could not be made accessible or compatible for users with disabilities, then presumably the Commission would say that such a legitimate feature trade-off had occurred.

So, we have here, not merely a failure to extend the protection of law to the vast array of new services coming online, but also an interpretation (which seems to markedly depart from the Access Board's view) that could result in the loss of access and of functionality in connection with basic services whose accessibility is already both protected by law and a matter of common practice.

We urge the Commission to qualify its "legitimate feature trade-off' concept by making clear that the Commission asserts no power to apply this concept to accessibility rights protected under other statutes, including under other sections of the Telecommunications Act itself (e.g. Secs. 225 or 7 10).

UCPA believes that the FCC possesses ample legal authority to reclassify services. We do not contend that the Commission can or should alter the categories, but we do believe that it has considerable discretion in determining which services go into which category. If the Commission agrees, we urge it to use that authority to reconsider what services are indispensable to meaningful telecommunications access for Americans with disabilities.

We base our views concerning the Commission's authority on three factors. Firstly, the primary controlling precedent for classification appears to be the Commission's Computer II proceeding. That set of rulings and orders, like the subsequent ratifications by Congress of what the Commission had done, were not undertaken with disability or accessibility in mind. No one in 1980 dreamed of either the issues, the technology, the legal framework or the social consciousness we would be facing today. To apply them understandings of 1980 to circumstances, facts and issues that were never considered and to which they are not relevant would be a great mistake.

Even if the Commission believes that its regulatory precedents do govern its classification or other key Sec. 255 decisions, the Commission has the power to reopen those proceedings and amend its rulings if it believes they would otherwise lead to an inappropriate result.

The Commission has elsewhere asserted its authority to reclassify various services. The NPRM (paras. 38-39) reflects the exercise of this authority in 1996. Given the similar issues raised in the parallel universal services deliberations, the moment is ideal for the Commission to thoroughly rethink its allocation among categories of telecommunications services. Congress and Americans with disabilities expect the Commission to do so.

In confronting the issue of which telecommunication services are basic and which are not, the Commission must develop a process for ascertaining and responding to the views and experience of a wide variety of stakeholders. These assignments can no longer be made on the basis of historical distinctions or engineering variables. As the Commission itself recognizes by its reference to the public interest, the realities of telecommunications usage in this country are what must determine which services are basic. UCPA offers to work with the Commission in any ongoing or periodic effort to ascertain the needs and experiences of Americans with disabilities in this connection.

COMMENT 4 SUGGESTIONS FOR SITUATIONS WHERE COVERED AND NONCOVERED SERVICES ARE BUNDLED
(re paras. 44-46)

We agree with the Commission's interpretation of the term "provider" of telecommunications services. Application of Sec. 255(c) to all entities providing telecommunications services to the public represents the only viable strategy for implementing this provision of the law.

Aggregators, resellers and others who do not themselves design the service may claim that they lack capacity to guarantee its accessibility. But the objects of the law would be frustrated if its coverage were limited to the entities that originate the service.

If resellers and other entities were allowed to avoid the obligations of the law, the result would be the creation of a contracts exception to the law, under which those who

provide services to the public, which they had obtained by contract from others, could claim an unjustifiable exemption from the law. The Commission is correct in taking steps to prevent this from happening, and to prevent a huge loophole from being opened in the law.

The Commission also asks how telecommunications services providers which provide both covered and non-covered services should be treated. Using the example of local exchange companies (LEC's) that provide both covered telecommunications and non-covered cable services, the Commission asks what accessibility requirements should be imposed on such entities.

By way of answer the Commission proposes to require such entities to provide accessibility to the extent that their services are covered. But the Commission goes on to express concern that requiring a company's offerings to be partially accessible might raise practical problems.

We recognize that such an approach may present practical difficulties in some cases, but what are the alternatives? Such entities can hardly expect to be exempted from accessibility requirements in their entirety. If that were permitted, telecommunications service providers could escape accessibility obligations simply by adding some non-telecommunications services or some non-basic telecommunications services to their offerings. (Compare NPRM para. 52.)

However, if telecommunications service providers find the partial accessibility requirement impractical or onerous, they could always voluntarily pursue complete accessibility of all their services. Nothing in the law prevents them from going beyond the bare minimum, especially if doing so would be more feasible and or less costly. In fact, to anticipate our discussion of "readily achievable" below, the Commission should make clear that no contention of "non" "readily achievable" will be accepted in one of these dual status situations if it can be shown that by going beyond minimal compliance with the law, accessibility or compatibility would be readily achievable.

COMMENT 5 DON'T NARROW THE SCOPE OF COVERED EQUIPMENT
(re paras. 47-49, 54-56)

In its definition of CPE, the Commission introduces a bizarre and unworkable distinction. While the Commission recognizes that software is integral to the accessibility and usability of all equipment, it proposes to draw a legal distinction between software which is "integral" to CPE and software which, though equally involved in the equipment's use, is sold or purchased separately from the CPE. The Commission seems to be saying that this latter category of software is not "integral" to CPE and therefore is not covered by the law. So this software, whether resident in the

server or purchased for some application, is not covered by the law. It doesn't have to be accessible. Even if the manufacturers of CPE fully expect that people will go out and buy the additional software, neither these manufacturers nor the designers of the software have any responsibility for its accessibility so long as it is not sold in the same box as the hardware.

How far the Commission is seriously prepared to go in its parsing of the word "integral" remains to be seen. If the Commission's concern is to insolate manufacturers of CPE from responsibility for the accessibility or usability of software over the design of which they have no control, then the Commission should adopt a "reasonable person" standard. Under this test the key question would be: Did the manufacturer of the CPE have an reasonable basis for expecting that the given software or operating system would be used for telecommunications-related purposes with its CPE product? An additional advantage of using the "reasonable person" test is that it would allow the law to reach the designers and manufacturers of software as well. For them the question would be: Was this software developed and marketed expressly or primarily for use with a given item of CPE? If so, the software manufacturer has the responsibility to see to it that considerations of accessibility are incorporated into its design.

There is nothing novel in this approach. Software is not designed in a vacuum without with no reference to the items of hardware on which it will run. Software is not downloaded from the Internet without regard to what CPE device it will be used with.

The Commission's approach to defining the word "integral" is shockingly simplistic. Moreover, the apparent distinction the Commission proposes runs the risk of creating incentives and market distortions that are surely no more desirable to industry than they are to the disability community. Make commonsense, not packaging, the test of what is integral.

COMMENT 6 INCLUDE SPECIFIC OBLIGATIONS BEARING ON USABILITY (re para. 61)

The Commission recognizes that there may be entities such as retailers or wholesalers who have responsibilities under Sec. 255, but who do not easily fall within the definition of "manufacturer" or "assembler" (NPRM pax-as. 58-60) that the Commission proposes to use. Accordingly, the Commission seeks comment on whether such entities with responsibility for customer support or for other activities covered by Sec. 255 should be treated as if they were manufacturers. In the alternative, should manufacturers or final assemblers bear any ongoing responsibility for the actions of their intermediaries and agents once products leave the factory? Some may say that requiring them to do so would be like requiring them to accept responsibility for whether pay telephones are installed at ADA-compliant heights. But no such analogy applies. The law addresses the question of "usability" very specifically, and the Commission needs to make clear that in cases such as this, the obligations of usability are not subsumed under accessibility or compatibility.

It would be foolish to say that manufacturers have no control over the ways their brand-named products are marketed to the public by unaffiliated retailers. In fact, the tie-ins, cross-promotions, inventory replenishment and numerous other relationships among many manufacturers and retailers adequately serve to establish the legal requirements for applying the doctrine of agency in these cases. For many purposes, including the selling of extended warranties, the transmittal of basic warranties, the provision of customer service, and host of other matters, entities who do not themselves manufacture or assemble telecommunications equipment and CPE can be considered the agents of those who do. Accordingly, it is highly appropriate for the Commission to impose responsibility for usability issues as defined by the Access Board on manufacturers of CPE.

COMMENT 7 DON'T NARROW THE COMPATIBILITY REQUIREMENT BY A STRANGE INTERPRETATION OF THE WORDS "COMMONLY USED" (re para. 90)

In its effort to specify the scope of the compatibility requirement (Sec. 255(d)), the Commission attempts to define the term "commonly used". UCPA strongly protests against the criteria proposed by the Commission.

The Commission proposes affordability and widely used as the alternative standards. For man people with disabilities, affordability is the major access issue they face. In many cases, they must rely upon various service programs and third-party providers to obtain the access equipment they need, Since virtually no equipment would be affordable to many of these individuals on their own, the Commission's proposed affordability standard would be left to apply only to either the most inexpensive and low tech items. For the few individuals whose wealth makes anything affordable, application of the affordability standard would also be problematic, So the question becomes, affordable to whom?

The other standard proposed by the Commission is equally unworkable. Reliance on a presumption, albeit it a rebuttable one, of the sort the Commission proposes would have many acute disadvantages. Not least of these is that it would give manufacturers of CPE enormously greater opportunities to evade their compatibility obligations than the statute ever intended. Before proposing to use the available device lists maintained by state equipment distribution programs as a basis for establishing compatibility requirements under the Act, the Commission should be aware of narrow range of available devices under many of these programs and of the difficulties associated with getting any new devices approved for purchase.

UCPA recommends that the Commission adopt the Access Board's analysis of the issue (NPRM paras. 182- 184). We believe that this would adequately resolve the Commission's concerns and would yield the appropriate balance between predictability for industry and choice for consumers.

COMMENT 8 DON'T REDEFINE "READILY ACHIEVABLE"
(re paras. 94-123)

Few issues surrounding the implementation of Sec. 255 have attracted more attention than that of how the "readily achievable" standard, as developed under the ADA, is to be applied to telecommunications accessibility. As the Commission notes, wide agreement exists among commenters from both the disability and industry communities that telecommunications presents different and distinct issues. Accordingly, we agree with the Commission that the literal wording of the readily-achievable provision must be the starting point for its analysis and exploration (NPRM paras. 97-98).

The Commission asserts the need to add "telecommunications-specific" factors to the basic four ADA factors to be taken into account in determining ready-achievability. We agree that it is permissible for the Commission to add pertinent factors, but we question the definition of telecommunications-specificity the Commission has chosen to use. We also have serious reservations about some of the factors the Commission has identified for addition to the readily achievable mix.

The Commission never articulates its criteria for what makes a factor telecommunications-specific, But a number of the factors it mentions have nothing in particular to do with telecommunications. They would be equally applicable (or equally inapplicable) to the grocery business or to running a shoe store.

For example, take the added factor (NPRM para. 106) of "the degree to which the provider would recover the incremental cost of the accessibility feature." (See also para. 116.) Assuming that telecommunications-specificity is the test by which the appropriateness of proposed added factors is to be judged, what is there about cost recovery that makes it more germane or more specific to the telecommunications industry than it is to operating a shoe store.

Let us examine the example of a hypothetical shoe store to illustrate this point. Suppose a shoe store resisted removing physical barriers to access by arguing that it was a very unfashionable store carrying a limited range of poor quality products and, not surprisingly, having few customers. Imagine its arguing that it should be exempted from the otherwise readily achievable barrier removal obligation because it was unlikely if ever to recover its barrier removal costs. In the ADA context, that argument would be given short shrift.

Historically, the telecommunications industry has disbelieved that there was a market for accessible equipment and services. Many think they are wrong, and see encouraging signs that industry opinion is changing. Whatever the current industry consensus, the fact remains that if industry prior to February 8, 1996, had believed there was a market for accessible telecommunications, they would have taken steps to serve that market. They would have provided accessible equipment and services. Had they

recognized that there was a market, there would have been no need for Sec. 255. Cost recovery has not been a valid consideration under the ADA, and it should not be a valid consideration here.

Obviously shoe stores care about cost recovery just as much as telecommunications companies do. They would no doubt like to be able to argue that they shouldn't have to remove barriers, unless some increase in business is likely to result. Therefore we urge the Commission to explain what criteria it deems appropriate to use in deciding what factors are telecommunications-specific, or even telecommunications-related in any meaningful way.

We strongly urge the Commission to omit any notion of cost recovery from its list of factors to be considered. Although the Commission has considerable experience and expertise in dealing with cost recovery in the rate setting context, application of this concept to the manufacturing sector presents totally new and unprecedented issues.

Even if cost recovery were deemed telecommunications-specific, or "tailored to the circumstances" of telecommunications, and even if the Commission is disposed to implement so large an extension of its power to inquire into the business strategies of equipment manufacturers, application of the cost-recovery concept here would still present enormous practical and logistical difficulties. The time required for cost recovery depends upon many factors including a company's strategy for operating in a particular market. There is no direct correlation between a product's development costs and a manufacturer's pricing strategy for that product. Competitive factors and a host of other variables heavily influence pricing decisions. If recovery time is in large part a function of pricing decisions, then recovery time is also in large measure within a company's control.

Equally disturbing among new factors is the introduction of "opportunity costs" (NPRM para. 104) which brings a highly subjective element into play. Although the Commission does seek comment (para. 105) on "expeditious" means by which factual disputes can be resolved, the opportunity costs concept is by its nature so subjective, the Commission and the public will be almost totally dependent on the manufacturer or service provider for estimates of the level and nature of such costs. The issue is not one of how to settle disputed facts because as a practical matter, there will typically be no facts to dispute. The issue is not false assertions or claims either, for opportunity costs are real if one chooses or is willing to incur them.

If an equipment manufacturer or service provider does not believe that good accessibility is good business, then every penny spent on it represents an opportunity cost. If a CEO believes that chairing meetings about the company's accessibility strategy interferes with networking on the golf course, then such meetings constitute an opportunity cost. More seriously, if a company contends that accessibility efforts take engineers away from other key projects, it still doesn't follow that the manufacturer in question has incurred a real opportunity cost. The number of engineers on staff or under contract is a function of many business considerations. The deployment of such

personnel is determined by multiple factors. Why single out accessibility to take the blame if a manufacturer doesn't have adequate resources to meet all of its legal obligations and to pursue all of its development goals? We urge the Commission to abandon this vague and ill-defined concept.

TECHNICAL FEASIBILITY

In our view, feasibility is a highly appropriate and telecommunications-specific factor. But we do have concerns regarding how the Commission proposes to define it.

In its discussion of feasibility the Commission (pat-as. 102-l 03) does not address the uniquely telecommunications specific issue of timing. In many cases, accessibility features that would have been feasible at an early point in the product/service development process cease to be readily-achievable at a later stage. For this reason, the Commission should make clear that no claim of non-feasibility, and for that matter no claim of excessive difficulty or cost, or of impracticability, will be entertained or allowed as a defense if the problem could have been avoided by incorporation of accessibility considerations into the design, development and fabrication processes at an earlier point. While the Commission should be commended for taking a number of steps throughout the NPRM, to encourage just such early and integrated accessibility planning, the failure to mention the subject here is a grave omission.

This is different from the timing issue raised in para. 120 of the NPRM. We are not talking about the problems arising from the availability of new access solutions at later points in the life cycle of a product than were available when it was designed. Rather, we are concerned about access strategies that existed at the design stage and that are still viable at a later point but which have become more expensive or difficult to incorporate simply because of the complexities associated with retrofitting. In our view, he Commission does not adequately deal with contingency. Until and unless the Commission makes clear that the costs or difficulty of retrofitting will not be available as a defense if the need for retrofitting could readily have been avoided, a significant loophole will exist allowing manufacturers to gamble on when the failure to incorporate accessibility design into a particular product will be discovered.

Among the illustrative reasons listed by the Commission for why an accessibility feature might not be feasible, one is "legal impediments." We are curious what the Commission has in mind. One possibility that suggests itself is the inability to gain rights or licenses to use various equipment items or software. Another might be provisions of contracts that were entered into prior to adoption of Sec. 255.

The Commission should make clear that a claim of non-feasibility by reason of legal impediment will not be sustainable unless the entity making the claim can demonstrate that it has taken all readily-achievable steps to remove the impediment. By failing to include this stipulation, the Commission runs the risk of rewarding, not innovation, but passivity and indifference.

COMMENT 9 MAKE SOME FURTHER REFINEMENTS TO THE COMPLAINT PROCESS
(re paras. 124-161)

UCPA appreciates the efforts the Commission has made to balance a number of important but potentially conflicting objectives in its establishment of complaint and enforcement procedures for Sec. 255.

FAST-TRACK

The Commission regards its proposed fast-track process for informally and speedily settling disputes as the core of its enforcement strategy (para. 126). A number of complaints are likely to involve issues that cannot be resolved quickly or easily. A complaint alleging inaccessibility or incompatibility of a key feature or function of a device, if true, may not typically be resolved within five days.

The Commission recognizes (para. 137) the need for a mechanism to terminate fast-track where it is unlikely to lead to a mutually-satisfactory solution. It should also consider developing mechanisms for bypassing fast-track altogether where the dispute of such a nature as to make informal resolution unlikely.

The Commission proposes (para. 135 et seq.) that a five business-day period be allotted for the fast-track process. The Commission expects (para. 141) that an action report should ordinarily be forthcoming from the respondent by the end of this five-day period. In those instances where five days is not sufficient to resolve the complaint, but where it believes that the fast-track process will prove successful, the Commission reserves the right to grant an extension.

The Commission asks whether any outside time limit should be placed on the fast-track process, including extensions. UCPA believes that five days will not be long enough for the resolution, or even in many cases for the investigation, of many Sec. 255 complaints. We think it likely that many extension requests will be made. Rather than forcing the parties to go through a two-step fast-track process of initial complaint followed by extension request, we recommend that the initial fast-track period be lengthened but that the Commission grant no extensions beyond this lengthened initial period. We recommend that 20 business days should ordinarily be sufficient to balance the objectives involved.

CONSUMER SATISFACTION

It is not clear whether the complainant will have an opportunity to comment on the respondent's fast-track action report. The Commission must ensure that its determinations of whether fast-track has resolved the complainant's problem are not baaed on the respondent's opinion of whether the problem has been solved. The Commission should be in touch with the complainant before it decides whether fast-track has worked. Waiting to talk to the complainant by communicating its decision (para. 142) is toolate. Building Such contact between the Commission and the consumer into the complaint process would also afford the Commission an opportunity to make certain that the complainant understands what additional procedures are available and how to request them (para. 143). In structuring this or any contact, the Commission must be exquisitely sensitive to communication, method, cultural background and other variables. It must ensure that all materials are prepared in plain clear language, and its staff must be prepared to supplement the documentation when further explanation or clarification is needed.

STANDING

We agree with the Commission' decision (para. 148) not to impose a "standing" requirement for complaints under Sec. 255. We recognize that "standing" is a general requirement for bringing an action or filing a complaint under most civil rights laws, but we feel that the unique circumstances surrounding telecommunications access fully justify what the Commission has done. Rather than characterize the Commission's proposal as eliminating any "standing" requirement, we prefer to view the NPRM as recognizing that to the extent that anyone can suffer injury through inaccessibility of the telecommunications system, the question of who has "standing" should be answered as broadly as possible.

The harm done by inaccessibility is not merely to the individual. That harm is in a very real sense done to society, and anyone who is aware of it should have the right to protest. Moreover, even if we assumed that some individualized showing of harm were required to justify a Sec. 255 complaint, there would certainly be cases where real harm was done to individuals or entities who are not themselves the users of the inaccessible equipment or services. For example, if we at UCPA are prevented from hiring the most highly-qualified applicant for a particular job because inaccessibility of CPE prevents that individual from communicating with us or vice versa, we are harmed every bit as much as the applicant. If I am prevented from talking to my loved one over the phone because the telecommunications system is inaccessible to that person, the harm to me is poignant and real.

TIME LIMITS

We believe the Commission is correct (para. 149) in declining to impose time limits (a statute of limitations) on the filing of complaints under Sec. 255. Inaccessibility is not an all-or-nothing matter. Sometimes the inaccessibility of a major feature or function of one's equipment or of a particular telecommunications service may not become apparent until you try to use it in a particular way. Even then, given the complexities of the telecommunications system, it may take a while to realize that inaccessibility or incompatibility, rather than one's own lack of skill, is the real problem.

We also believe that at least initially, no time limit should be imposed on the decision whether to pursue a complaint beyond the fast-track process. An individual may initially be satisfied with a solution only to find later under different but equally appropriate conditions of use, that the solution doesn't really work. A consumer may accept the conclusions of the respondent that no solution exists only to learn later that one did exist of which the respondent was genuinely unaware. Because of these and similar possibilities, the Commission should await some experience of the Sec. 255 complaint process before imposing any time limits on what is essentially the right to appeal.

JOINDER

We agree with the Commission's decision to allow complaints to be brought against multiple defendants or to be brought by more than one party. We believe however that the joinder issues most likely to arise in the Sec. 255 context will be of a different sort. Typically, they will involve the claim by a defendant that some other entity is responsible for the alleged inaccessibility.

Given the complex interaction among telecommunications and network equipment, CPE and software, analysis of the source of an accessibility problem can often be exceedingly difficult. Anyone who has ever tried to have their telephone service restored after a mysterious outage has probably experienced the dispute as to whether the CPE, the inhouse wiring, or the carrier-maintained outside wiring is the source of the problem. This same sort of dispute magnified tenfold in complexity can readily be expected in the accessibility/compatibility context. What worries us is how the Commission will handle situations where an equipment manufacturer and service provider are more interested in blaming one another than in taking responsibility for solving the problem. Equally troubling is the situation where a manufacturer and a service provider go through the motions of blaming one another but do so with the concerted purpose that neither shall be held responsible.

The Commission needs to develop procedures, incentives and sanctions to quickly identify and effectively deal with these situations. Moreover, the Commission should develop some procedures that will allow consumers to file complaints, even when they are bewildered by the array of companies involved and genuinely have no idea which one is the appropriate respondent. Also, the Commission should clarify the effect if any upon the timeframes applicable to the fast-track process of cross complaints ("interpleader" in

legal parlance) by respondents against other entities whom they claim are the real cause of the problem.

FEES

The Commission proposes to charge a fee for filing formal complaints. We believe this is unwise and grossly unfair to consumers. Imposition of such a fee by an administrative agency is unprecedented in the annals of civil rights enforcement and would represent a significant barrier to many people with disabilities on fixed or limited incomes, particular people who have scrimped and saved to obtain the CPE they thought would give them access!

UCPA appreciates the Commission's probable motive in proposing this fee. We assume the Commission is seeking to deter frivolous or unfounded complaints and that it generally seeks to minimize the volume of complaints requiring formal adjudication. These legitimate concerns can be amply met in other less harmful ways.
In fact, by proposing to retain discretion over whether or not to grant the right to make a formal complaint, the Commission has already provided the necessary safeguards. Since the Commission reserves the right to refuse to allow formal complaints, there is no need to impose a fee in order to deter frivolous or unfounded complaints.

The requirement of a fee is additional unfair in that it would not deter frivolous or diversionary cross-claims by manufacturers and service providers against one another. If the Commission decides to retain a formal complaint fee requirement, it should at least provide a simple mechanism whereby individuals, without being required to disclose personal financial information, could with dignity request and be granted a fee waiver.

COMMISSION STAFF

The proposed rules place great emphasis on the role of the Commission as a formal and informal participant in the complaint resolution process. Among prescribed duties, Commission staff will

- receive and refer complaints;
- receive and evaluate action reports;
- confer with complainants;
- provide or locate technical assistance;
- recommend whether requests for formal complaint status should be granted;
- maintain equipment manufacturer and service provider contact lists; and
- generally provide the Commission's good offices in a number of settings.

These proposed roles of the Commission will be of great value to the disability community and to industry, but these objectives can't be achieved without the

commitment of adequate staffing, training and other resources to the effort. The Commission has not indicated the level of staffing or the type of personnel who will be involved in the management of the complaint process, and it has given no indication of the amount or kinds of training the staff will receive in accessibility issues, in alternative communication modes and formats, in the requirements of the law, or in other matters.

TECHNICAL ASSISTANCE RESOURCES

The Commission proposes to make use of arbitration, mediation and other forms of alternative dispute resolution in cases where the fast-track process fails to bring about a satisfactory resolution between the parties. The Commission also proposes to assist manufacturers and service providers by helping them to find appropriate technical assistance resources who can advise them in resolving accessibility issues.

UCPA wishes to place itself on record as eager to assist the Commission in any possible way in this connection. Our extensive national networks, our familiarity with broad range of experts and resources, and our grassroots involvement in regions and localities around the country, as well as our specialized national projects, lead us to hope and believe that we may prove of assistance to the Commission in one or more of these areas.

Comment 10 ADOPT COMPLIANCE CERTIFICATION AFTER PROPER SAFEGUARDS ARE PUT IN PLACE
(re para. 174)

The Commission seeks comment on whether any sort of Sec. 255 appliance certification process should be developed. Specifically it asks whether any sort of seal or imprimatur certifying compliance with Sec. 255 should be considered.

Without a parallel process for independently verifying claims made by covered entities for the accessibility of their offerings, we would answer the Commission's question in the negative. Nevertheless, it would be possible to answer the Commission's question in the affirmative once the Commission, working together with industry and the disability community, develops strategies and resources whereby the accessibility of the telecommunications system can in fact be tested and verified. UCPA hopes to contribute to that process and to the marshalling of resources for product testing, for recruitment of individuals with disabilities to participate in focus groups and customer needs assessment, and for the identification of experts and resources who can contribute in a variety of ways to the development, testing and dissemination of objective and replicable procedures for determining the accessibility and compatibility of a broad range of telecommunications products and services.

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NEW TELECOMMUNICATIONS TECHNOLOGY: GOOD NEWS FOR PEOPLE WITH DISABILITIES
FCC CHAIRMAN WILLIAM KENNARD CALLS NEW TELECOM ACTION (SECTION 255): "THE LIBERATOR"

(Washington, D.C. - April 2, 1998) "Good Morning Mr. Chairman and thank you for not hanging up on me which most people do when I try to use the telephone." This is what Federal Communications Chairman William Kennard heard when Gus Estrella called Kennard's cellular phone from a new wireless speaker phone to demonstrate new technology in telecommunications to participants of the Federal Communications Commission meeting. Leaders of the FCC came together to hear issues around telecommunications for people with disabilities and to witness demonstrations of new telecom products that serve the needs of individuals with disabilities. Chairman Kennard and fellow Commissioners Susan Ness, Harold Furchgotroth, Michael Powell and Gloria Tristani voted unanimously to adopt Section 255 of *The Telecommunications Act* of 2996 making telecommunications services, products and resources readily available, useable and accessible to Americans with disabilities. According to FCC Chairman William Kennard, technology can dramatically improve lives of some 54 million Americans with disabilities. He thanked representatives from the disability community who demonstrated new products and renamed Section 255, "The Liberator," in honor of Gus Estrella.

Estrella, a Policy Fellow for United Cerebral Palsy's national office, has cerebral palsy and uses an augmentative communication device (a computer with voice output) called, the Liberator. Because his voice is that of a computer, Estrella's phone calls are often hung up on, mistaken for a computerized sales call or a quirk call. Because he uses his hands to input thoughts into the Liberator, Estrella uses a speakerphone whenever he telephones, unlike most callers who use their own voices and standard telephone technology. When Estrella met with FCC leaders and demonstrated his new telephone technology, he placed a call to the Chairman's cellular phone and showcased accessibility features such as wireless remote control that allow him to answer and make calls, voice activated answering and large keypad buttons.

"What do you think of my ability to talk to you over the telephone without getting any help? asked Estrella. "Thank you for being here and making what we do here at the FCC so relevant," said

Kennard. Estrella was one of four individuals with disabilities demonstrating new telecommunications technology that best serves their specific needs. John Nelson, Chief of the Independent Living Branch of Rehabilitation Services Administration at the US Department of Education, demonstrated a small voice activated cellular phone, ideal for his needs and others with quadriplegia, amputation, or limited use of their hands; Nelson called Dan Fithian, Chief of Wireless Communications for the FCC by saying only, "Dan," to his tiny cellular phone. Claude Stout, representing Telecom for the Deaf, Inc. showed how the TTY system works by calling a colleague who also used the TTY technology. Scott Marshall of the American Council of the Blind demonstrated a new service available for people who cannot easily access print media which reads several daily papers and magazines to the caller on demand.

This new technology is the outcome of ***The*** Telecommunications ***Act*** of 2996. The act signed into law by President Bill Clinton in February of 1996 assures universal design as telecommunications products and services are developed, as well as expansion of closed captioning **and** video description. The law addresses deregulation of cable, telephone, television and other communication industry sectors, permitting providers of these services into each other's businesses and breaking down the existing regulatory monopoly barriers.

According to leaders from the disability community, this is good news for people with disabilities in America. "Accessibility and usability by people with disabilities **has** been the ultimate goal," said Gus Estrella. "Providers of telecommunications services and manufacturers of equipment must meet the needs of people with hearing, speech, vision, motor and cognitive disabilities as they design, develop and fabricate equipment and services, if it is readily achievable."

Disability rights advocates foresee significant changes in the job market for people with disabilities as a result of the law, and a diverse more efficient workforce accommodated by new telecommunications services and products . For instance, persons with cerebral palsy today do not have easy access to the current voice based networks due to motor disabilities and to limited speech capability. New equipment can prevent "hang ups" and disconnects for users of electronic speech communication devices, such as Estrella and others with cerebral palsy, who use synthesized speech. Built in voice activated dialing can accommodate those who can't use current phones due to their motor disabilities. "These provisions in Section 255 of the telecommunications bill are essential if universal design is to be undertaken by telecommunications providers. Products and services will be more user friendly for all consumers, not just those with disabilities," said Estrella. "As technologies converge, we want children and adults with disabilities to be able to access and use the same

services that are available to all other children and adults."

According to UCPA staffer, Jenifer Simpson, who has worked for six years on telecommunications law and issues, universal design access requirements imposed on all providers of telecommunications services are essential to the full independence, integration and inclusion of people with disabilities in American society. New communication technologies, and their convergences, will change the content and conduct of work for everyone, and especially for individuals with disabilities, for whom technology is often a necessity, not a luxury."

According to the law, companies that provide interconnectivity of telecommunications services must address disability access needs. Advocates stress this is critical because as convergences of technologies develop, a particular medium or mode or channel must not shut out use by persons with functional limitations of any kind. Additional sections of the law require closed captioning in most video programming unless providing captioning is an undue burden on the provider. (Closed captioning is a known technology for persons with hearing and learning disabilities.) The bill also includes provisions requiring the FCC to look at how video description could be implemented by the industry. (Video description is another known technology, providing a real time auditory description of visual sights and actions for persons who are blind or significantly visually disabled.)

The ***Americans with Disabilities Act (ADA)*** amended the Act to include nationwide relay services and other recent legislation addressed closed captioning and hearing aid compatibility. This part of The Telecommunications ***Act of*** 2998 marks the first time that disability access safeguards have been incorporated to such a degree in the ***Communications Act of 1934.***

According to disability advocates at United Cerebral Palsy, less than adequate access to telecommunications has been endured by Americans with disabilities for decades. With equivalent technological access, with ensuring telecommunications access and use, individuals with disabilities will experience a leveling of the playing field in employment. Historically, people with disabilities experience the highest unemployment rate of all groups in America - some 67% are unemployed. Currently, about 10 million Americans with severe sensory disabilities are unemployed, often relying on public supports.

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